

IN THE
Supreme Court of the United States

OCTOBER TERM—1942

No. 789

MITSUBISHI SHOJI KAISHA, LTD., a corporation,
GENERAL PETROLEUM CORPORATION OF CALI-
FORNIA, a corporation, ROYAL INDEMNITY COM-
PANY, a corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corporation,

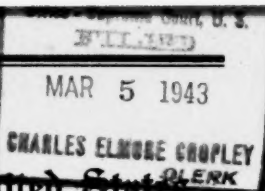
Petitioners (Appellants Below),

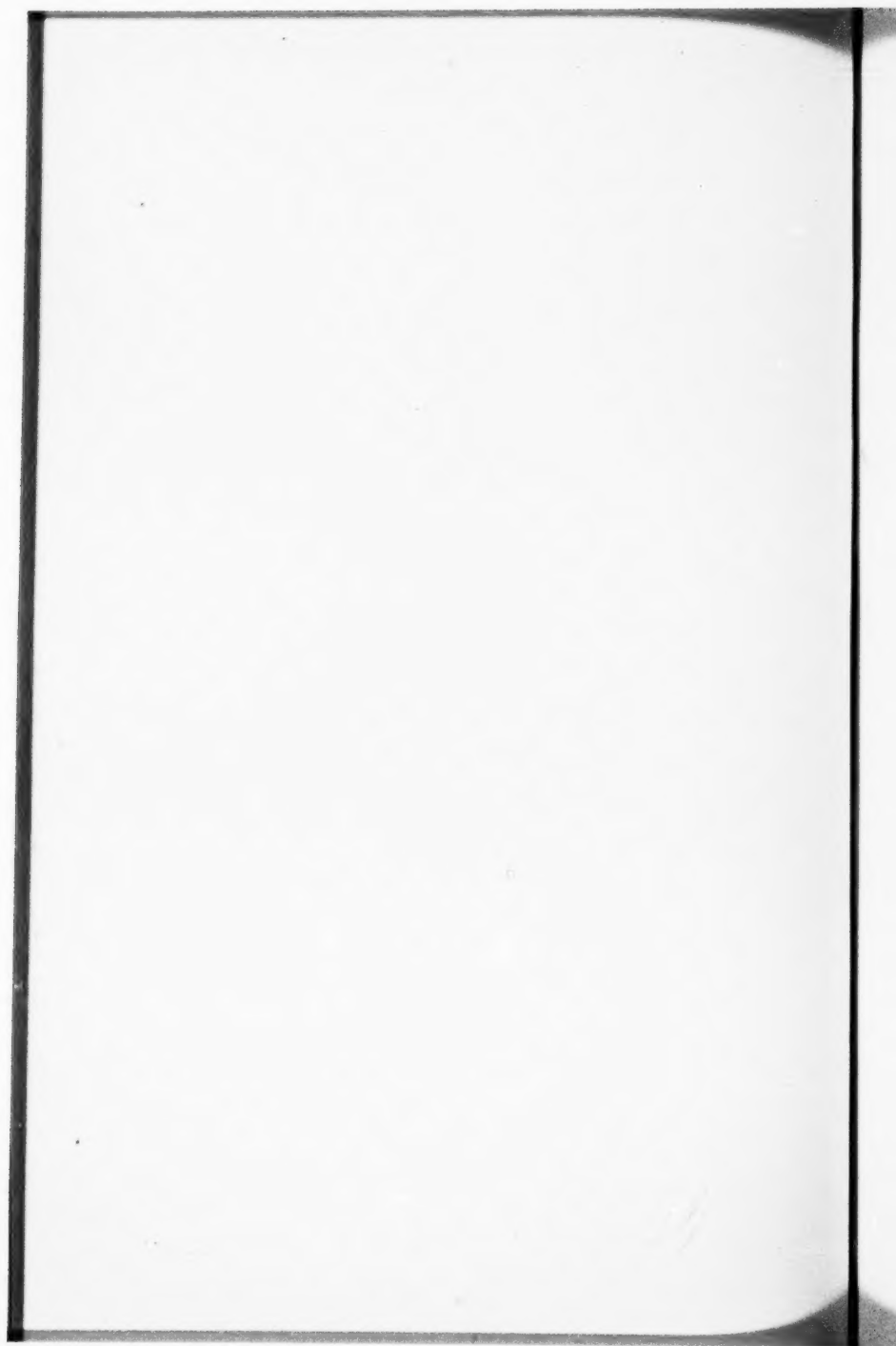
against

SOCIETE PURFINA MARITIME, a corporation,
Respondent (Appellee Below).

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT, AND BRIEF IN
SUPPORT THEREOF

JOHN W. CRANDALL,
GEO. WHITEFIELD BETTS, JR.,
ARCH E. EKDALE,
MARTIN J. WEIL,
Counsel for Petitioners.





SUBJECT INDEX

	PAGE
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT..	1
Jurisdiction	2
Statement	2
Decisions Below	8
Questions Presented	10
Specifications of Error to Be Urged.....	14
Reasons for Granting the Writ.....	17
 BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI	 21
Summary of Argument	21
 POINT I.—The lower Court erred in its determination as to the nature of the requisition of the <i>Laurent</i> <i>Meeus</i> and its effect on Mitsubishi's liability for freight	 22
 POINT II.—The Court below erred in failing to hold that the charter was subject to conditions precedent, one express and one implied, in the form of the Belgian Government's approval, and that when the ap- proval was withdrawn the contract was dissolved <i>ab initio</i>	 26
 POINT III.—The lower Court erred in holding that Mit- subishi became liable for the freight either before or after receipt of the telegraphic notice of the signing of the bills of lading.....	 28

	PAGE
POINT IV.—The lower Court erred in holding that Purfina was excused by the “Restraints of Princes” clause from performing the contract but that Mitsubishi was nevertheless required to pay the freight	31
POINT V.—The lower Court erred in holding that Purfina did not breach the charter.....	36
POINT VI.—The Belgian Government, which cancelled the voyage, has an interest in this litigation, arising from its sovereign power to expropriate the freight sued for, which, if collected, it will receive from Purfina. The lower Court, apart from anything else, erred in granting Purfina a decree under these circumstances	39
POINT VII.—The questions presented are of great importance and are of general interest to the shipping world and to the public at large.....	41
CONCLUSION	42

TABLE OF AUTHORITIES CITED

Cases

	PAGES
Admiral Shipping Co. v. Weidner, Hopkins & Co., 86 L. J. K. B. 336.....	32
Allanwilde, The, 248 U. S. 377.....	9, 10, 13, 15, 18, 33, 34
Antlers Athletic Ass'n v. Hartung, 85 Col. 125; 274 P. 831, 832	25
Arantzazu Mendi, The (1939), P. 37, 62 Lloyd's List L. R. 55 (1939) A. C. 256.....	24
Bris, The, 248 U. S. 392.....	9, 10, 13, 15, 18, 33, 34
Bullock and others v. Finley, 28 Fed. 514 (C. C. Ohio) ..	37
City of Carbondale v. Wade, 106 Ill. App. 654.....	25
Compania Espanola v. The Navemar, 303 U. S. 68.....	23
Cosmopolitan Shipping Company, Inc. v. Hatton & Cookson, Ltd., 34 Lloyd's List L. R., 231.....	38
Cristina, The (1938), A. C. 485, 60 Lloyd's List L. R. 147	24
Ex Parte Muir, 254 U. S. 522.....	23
Gracie D. Chambers, The, 248 U. S. 387.....	9, 10, 13, 15, 18, 33, 35
Higgins et al. v. Anglo-Algerian S. S. Co., 248 Fed. 386 (C. C. A. 2).....	25, 40
Jones Store Co. v. Dean, 56 Fed. (2d) 110 (C. C. A. 8) ..	25
Kabalo, The, 67 Lloyd's List L. R. 572.	24
Kish v. Taylor (1912), A. C. 604.....	34
Laurent Meeus, The, 43 Fed. Supp. 807.....	8
Lillard v. Kentucky Distilleries & Warehouse Co., 134 Fed. 168 (C. C. A. 6).....	37
Malcolm Baxter, Jr., The, 277 U. S. 323.	9, 10, 13, 15, 18, 19, 33, 34, 35, 38
National Steam Navigation Co. Limited of Greece v. International Paper Co., 241 Fed. 861 (C. C. A. 2) ..	29, 30
New York Life Ins. Co. v. Brown, 99 Fed. (2d) 199 (C. C. A. 4)	25
O'Brien v. Miller, 168 U. S. 287.....	25

	PAGES
Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, 27 Fed. (2d) 129 (C. C. A. 2).....	25
Queen of the East, The, 12 Fed. 165 (C. C. E. D. La.)...	37
Rotterdamsche Lloyd v. Gascho Co., 298 Fed. 443, 445 (C. C. A. 9)	34
Smith Hill & Co. v. Pyman Bell & Co. (1891), 1 Q. B. 742	30, 38
Texas Co. v. Hogarth Shipping Co., 256 U. S. 619.....	10, 11, 13, 15, 18, 27, 35
The Great Indian Peninsula Railway Company v. Turnbull, 53 L. T. R. 325	38
Tornado, The, 108 U. S. 342 (2 Sup. Ct. Rep. 746)....	10, 11, 13, 15, 18, 27
United States v. Cornell Steamboat Co., 202 U. S. 184, 194	40
United States v. Willamette Val. & C. M. Wagon-Road Co. et al., 54 Fed. 807 (C. C. Ore.).....	25
Wabash Drilling Co. v. Ellis, 20 S. W. (2d) 1002, 1004 (Ky.)	25
Weir & Co. v. Girvin & Co. (1899), 1 Q. B. 193; affirmed (1900), 1 Q. B. 45.....	38

Statutes

Judicial Code (28 U. S. C. A. Section 347a).....	2
Rules of United States Supreme Court, Rule 38, Section 5, Subdivision (b).....	2

Textbooks

21 Corpus Juris, p. 1181, § 184.....	25
Wigmore on Evidence, 3rd Ed., Vol. IX, §§ 2431, 2430..	26
25 Corpus Juris Secundum, § 21, p. 109.....	37
Benedict on Admiralty, 6th Edition, Vol. I, § 71, pp. 148, 150	40

IN THE
Supreme Court of the United States

OCTOBER TERM—1942

No.

MITSUBISHI SHOJI KAISHA, LTD., a corporation,
GENERAL PETROLEUM CORPORATION OF CALI-
FORNIA, a corporation, ROYAL INDEMNITY COM-
PANY, a corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corporation,

Petitioners (Appellants Below),

against

SOCIETE PURFINA MARITIME, a corporation,
Respondent (Appellee Below).

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The petitioners herein pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit, to review a decision of that Court, rendered on December 10, 1942 (R. 770) modifying a decree of the United States District Court for the Southern District of California, Southern Division, and affirming the said decree as so modified.

Jurisdiction.

The date of the decree of the Circuit Court of Appeals is December 10, 1942 (R. 771). On January 5, 1943, the petitioners filed a petition for a rehearing in that Court and the said petition, after the Court ordered certain amendments to its opinion, was denied on January 15, 1943 (R. 772). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347(a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statement.

This is a suit by the respondent, Societe Purfina Maritime (hereafter called "Purfina"), as alleged owner of the Belgian motor tanker *Laurent Meeus*, against the petitioner, Mitsubishi Shoji Kaisha, Ltd. (hereafter called "Mitsubishi"), the charterer of the vessel under a charter party dated September 21, 1940 (Lib. Ex. 53(4), R. 18), and against 8,598.09 long tons of Diesel oil, the cargo which had been loaded aboard the vessel at San Pedro, California, for the recovery of freight amounting to \$92,279.95 alleged to be due under the charter. The oil, which was libeled under a claim of lien given by the charter, was claimed by the petitioner, General Petroleum Corporation of California (hereafter called "General Petroleum") and was released on a bond in the sum of \$64,000 furnished by the petitioner, Royal Indemnity Company.

Purfina's claim is based on clause 2 of the charter (R. 18), which reads as follows:

"2. The freight to be paid in cash in New York less 1% discount on telegraphic advice of signing Bills of Lading and is to be considered earned and not returnable ship and/or cargo lost or not lost."

Mitsubishi filed a cross libel against the *Laurent Meeus* and Purfina, claiming damages for alleged breach of charter by Purfina (R. 20-24). The Belgian Ambassador promptly communicated with the Secretary of State requesting that the *Laurent Meeus* be released from the arrest as a public vessel of Belgium. On the instructions of the Secretary of State, the United States Attorney for the Southern District of California filed a Suggestion in the District Court, setting forth the Ambassador's communication (R. 66-77). After hearings, the District Court entered an order releasing the vessel from the arrest, on the ground that she was in the possession and subject to the control of the Belgian Government (R. 85-87).

All vessels of Belgian registry were requisitioned by the Belgian Government following the German invasion of Belgium on May 10, 1940. Instructions to that effect were transmitted by the Belgian Government to the Belgian Diplomatic and Consular Officers abroad through the Belgian Embassy in London on May 19, 1940 (R. 72).

The *Laurent Meeus* left Amsterdam just before the invasion, and after stopping at Falmouth, England, made her way to Port Arthur, Texas. On June 6, 1940, while she was at that port, her master, Richard O. Lippens, was summoned by the Belgian Consul at Galveston, Texas, to appear at his office. He accordingly went to Galveston, and received from the Consul an order notifying him that his vessel had been requisitioned, and signed the order as required. On the same day Lippens instructed the chief officer to make an entry of the requisition in the ship's log (R. 206-209, 309-313).

On July 9th and 10th, Belgian tankers were notified that they might undertake round trip voyages between two ports of the American continent, at the risk of their owners,

and subject to previous approval of the Inter-Allied Shipping Commission of London, and of the competent Belgian Consul (Lib. Exs. 9 and 10, translated, R. 225, 226).

On July 25th Lippens was advised that Belgian tankers had a short time before been granted licenses for a period of four months to trade for their own account between any country of North, South or Central America, with the exception of Mexico, provided that the London Embassy should be notified when each round trip was completed (Lib. Ex. 54(27), translated, R. 503, 504).

Laurent Meeus, for whom the ship was named, was then in San Sebastian, Spain. He was the president of *Companie Financiere Belge de Petroles*, commonly called "Petrofina," the parent company of Purfina (R. 484-487). Jacques Meeus, his nephew, was in Texas when the vessel reached Port Arthur. After the ship's arrival at Port Arthur, Captain Lippens sent a cable to Mr. L. Castelain, head of Purfina's shipping department, who was then in Hendaye, France (Lib. Ex. 5, R. 218, 219). Lippens obtained Castelain's address from Collin & Gissel, Purfina's brokers and agents at Houston, Texas. Lippens stated in this cable that he and Jacques Meeus could represent Purfina and suggested certain employment for the vessel. Castelain, in reply, cabled Lippens approving employment of the ship (Lib. Ex. 6, translated, R. 219). In late July, Jacques Meeus received a cable from his uncle, Laurent Meeus, telling him and Lippens to decide upon the employment of the vessel (Lib. Ex. 54(28), translated, R. 504). On August 21st Meeus cabled the Belgian Economic Commission in London (hereafter called the "B. E. M."), advising the Commission that he and Lippens were managing the tanker on the authority of President Laurent Meeus, and were depositing her earnings with Collin & Gissel, as

agent and trustee for the owners (Lib. Ex. 54(29), R. 507). The B. E. M. agreed to Collin & Gissel as agents but stated that it must act as trustee for the vessel's freights (Lib. Ex. 54(30), R. 509).

After some fruitless attempts by Lippens and Meeus to secure employment for the vessel in the carriage of oil between Houston, Texas, and Tuxpan, Mexico, Lippens was advised by Collin & Gissel of a possible voyage for the vessel from New Orleans to Japan with a cargo of oil. This was the voyage just prior to the one in dispute. The proposal was submitted to the Belgian authorities and approved, and a charter was thereafter executed and the voyage performed (Lib. Ex. 11, R. 228, 229; Lib. Ex. 13, R. 230).

In the latter part of August, 1940, Jacques Meeus submitted the vessel to Simpson, Spence & Young, hereafter called "Simpson," chartering brokers in New York, for such voyages as might be secured for her. Simpson communicated with David MacNeil, an employee in Mitsubishi's traffic department, and after a preliminary conference made a written offer of the vessel to Mitsubishi, on August 27th, for two voyages from California to Japan, "subject to approval Belgium Government, London" (Lib. Ex. 53(1), R. 398). Mitsubishi made a verbal counter-offer for the vessel to Simpson for one voyage only from California to Japan, subject also to permission of the Japanese Government (R. 401). On August 28th Simpson wrote Mitsubishi accepting the counter-offer, subject to the approval of the Japanese Government (which was promptly secured) and also subject to the approval of the Belgian Government, London (Lib. Ex. 53(2), R. 402-404).

Various cables were then exchanged between Meeus and the B. E. M., in London and after considerable delay

the B. E. M. granted approval for the voyage, and thereupon the charter party, which was dated September 21, 1940, was executed (Lib. Ex. 53(4), R. 18). Under the charter the vessel was to carry about 8,500 tons of crude oil and/or Diesel oil from a safe port in California to one or two safe ports in Japan, between Yokohama and Nagasaki. The cargo loaded was Diesel oil.

The *Laurent Meeus* arrived at San Pedro on September 30, 1940, and the Merchant Ship Control granted a departure permit on October 1st. The loading of the vessel was commenced at 1:55 P. M. on October 1st, at the dock of General Petroleum, the supplier and owner of the oil, and was completed at 10:10 A. M. on October 2nd (Stipulation, R. 172). Directly after the completion of loading the master signed bills of lading for the oil (R. 254). The *Laurent Meeus* was not able to sail, however, because of the necessity of making repairs to her engines and replacements in her crew.

On October 2nd, at 7:30 P. M., Lippens received a telegram from the Belgian Ambassador at Washington ordering him to postpone sailing until further notice (Lib. Ex. 27, R. 274, 275; Stipulation, R. 91). On October 3rd the departure permit was suspended.

The freight clause, as before noted, provided that the freight should be paid on telegraphic advice of signing of the bills of lading. Purfina failed to send this telegraphic notice to Mitsubishi upon execution of the bills of lading but waited until October 11th before doing so (Respt. Exs. D and E, R. 654, 655). But at that time the vessel's sailing was under suspension by the Belgian Ambassador.

The October 2nd stop order stood until October 15th, when Lippens received a further telegram from the Ambassador authorizing him to proceed, but ordering him to

report to the British Authorities at Singapore after completion of unloading, instead of returning to the United States (Lib. Ex. 30, R. 277, 278). A departure permit was also granted by the Merchant Ship Control on that day. (It was later revoked on October 18th and a new one granted on October 19th.) The vessel was already short of a full crew and most of the remaining crew members refused to sail when the proposed change in the vessel's itinerary was announced, because it violated their articles. Moreover, practically all of the members of the crew refused to sail under any circumstances because of an article which appeared in the Los Angeles Examiner on October 19th stating that the British were planning to seize the vessel when she passed the three-mile limit (R. 303-306, 356-358).

On October 22nd the master received another telegram from the Belgian Ambassador ordering him to suspend sailing until further notice (Lib. Ex. 34, R. 280, 281). This order remained in effect until November 5th, when the master received a telegram from the Ambassador cancelling the permission to make the voyage and ordering the transshipment of the oil (Lib. Ex. 38, R. 283).

On November 16th the Belgian Consul at Los Angeles handed Lippens a note stating that the vessel's trading permits theretofore issued had been cancelled, as the need of the vessel for the purposes of State had become apparent (Lib. Ex. 41, R. 288, 289). Also, on November 16th, the Belgian Consul delivered to Lippens a statement that the Belgian Government was in possession of the vessel (Lib. Ex. 42, R. 290), and Lippens signed a statement to that effect, and also that he was holding the vessel for the Belgian Government and subject to its order (Lib. Ex. 43, R. 291). On the same day, the Belgian Consul made an entry in the vessel's Lettre de Mer, or passport, that she

was in the possession of the Belgian Government (Lib. Ex. 44, translated, R. 292).

Purfina's libel (later amended) was filed on November 17, 1940 (R. 7-17) and the cross libel of Mitsubishi was filed on November 22, 1940 (R. 20-24).

Decisions Below.

The opinion of the District Court is printed on pages 92-99 of the record and is reported in 43 Fed. Supp. 807, under the title of *The Laurent Meeus*. Its findings of fact and conclusions of law are printed at pages 99-122 of the record. The opinion of the Circuit Court of Appeals is printed at pages 745-770 of the record. The Navy Department has requested that it not be reported until after the conclusion of hostilities with Japan.

The District Court held that the *Laurent Meeus* was not fully requisitioned until November 16, 1940, when actual possession allegedly was taken by the Belgian Government; that the actions of the Government with regard to the vessel between June 6th and November 16th were merely restrictions on her movement and were not in the nature of a control that accompanies a full and complete requisition; and that in any case Mitsubishi was precluded from claiming that the vessel was requisitioned on June 6th because of the allegations of its cross libel that the vessel was owned, operated and controlled by Purfina. The Court held that if the charter was contingent upon the approval of the Belgian Government, the condition should have been inserted in the charter, and that in any case Mitsubishi, by filing its cross libel, made an irrevocable election to affirm and rely upon the charter, and was thereby precluded from claiming that the charter was dissolved.

ab initio. It also held that the freight was irrevocably earned upon the signing of the bills of lading and became payable by Mitsubishi on October 11, 1940, upon receipt of telegraphic notice of the signing. The Court also held that the sailing of the vessel was prevented by the authorities of the United States and Belgium and that while Purfina was excused from performance by the provisions of the charter, Mitsubishi was liable for the freight. While the Court felt that Purfina would be unjustly enriched in a large part by the payment of the charter hire, it considered itself bound by the decisions of this Court in *The Allanwilde*, 248 U. S. 377; *The Bris*, 248 U. S. 392; *The Gracie D. Chambers*, 248 U. S. 387, and *The Malcolm Baxter, Jr.*, 277 U. S. 323. The Court further held that the vessel was not unseaworthy and that Purfina had not breached its contract by failing to sail before the suspension of the voyage, and that the failure to sail was due to Mitsubishi's failure to pay the freight. The decree ran against Mitsubishi for the full amount of the freight and against the cargo and Royal Indemnity Company, the surety on the stipulation for value, for \$64,000, the amount of the stipulation, and against General Petroleum *in personam* for interest on \$64,000 from December 19, 1940, to the date of the decree (R. 92-99; Findings and Conclusions, R. 99-122).

The Circuit Court of Appeals held that the requisition of June 6, 1940, was for no greater purpose than the Belgian Government's direction of the use of the vessel for Purfina's account, and that it did not affect Mitsubishi's liability for freight; also, that the stipulation for the Belgian Government's approval was not an agreement that the Government would not thereafter exercise powers which would frustrate the venture. It further held that the vessel was not unseaworthy on October 2nd and that the custom of

tankers to leave San Pedro directly after their cargoes had been loaded did not apply to a single voyage such as this. It also held that the freight clause was valid and that the freight was due and earned on the loading of the cargo and was payable when Mitsubishi received telegraphic notice on October 11th of the signing of the bills of lading; also that the restrictive acts and interferences of the Belgian and United States Governments before November 16th were but temporary obstructions, and that the voyage was not frustrated until November 16th, when the Belgian Government took over actual possession of the ship; that Purfina was excused from performing the charter by the "Restraints of Princes" clause and that it was incumbent upon Mitsubishi to show that the frustration was caused by Purfina, even if the vessel was unseaworthy on October 2nd. It held further that the cases of *Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619, and *The Tornado*, 108 U. S. 342 (2 Sup. Ct. Rep. 746), were not applicable but that the controlling decisions were those in *The Allanwilde*, *The Gracie D. Chambers*, *The Bris* and *The Malcolm Baxter, Jr.*, *supra*. The Court finally held that the award of interest against General Petroleum, the claimant of the oil, prior to the entry of the final decree, was erroneous and modified the decree by striking out the award of such interest and affirmed the decree as so modified (R. 745-770).

Questions Presented.

1. Whether the *Laurent Meeus* was requisitioned by the Belgian Government on June 6, 1940, and, if so, what were the legal effects of the requisition on the charter in question.

2. Whether the proceedings in Los Angeles on November 16, 1940, constituted the requisition of the vessel or whether they amounted simply to a cancellation of the trading permits granted to Purfina by the Belgian Government following the requisition in June.

3. Whether the granting of the said trading permits to Purfina made it a licensee of the Belgian Government and thus estopped it from relying on the Government's acts of interference as an excuse for non-performance of the charter.

4. Whether the requisitioning of the *Laurent Meeus* on June 6, 1940, made the Belgian Government in effect a party to the charter, and, if so, whether the Government's withdrawal of its approval of the voyage operated as a cancellation and dissolution of the charter.

5. Whether the condition precedent on which the parties stipulated, namely, the Belgian Government's approval of the voyage and the charter, meant a continuing approval, which survived the execution of the charter.

6. Whether the Belgian Government's withdrawal of its approval of the voyage, which was the condition upon which the venture was predicated, resulted in the dissolution of the charter, and with it the freight clause, *ab initio*.

7. Whether the non-availability of the *Laurent Meeus* for the performance of the charter, due to the acts of the Belgian Government, and in part to the acts of the United States Government, brings the present case within the rule laid down by this Court in *Texas Co. v. Hogarth Shipping Co.* and *The Tornado*, *supra*, that a contract is subject to an implied condition that it shall be dissolved if the thing

essential to its performance ceases to exist or be available for its performance, without the fault of either party.

8. Whether, under the freight clause in the charter, providing that freight should be paid in cash on telegraphic advice of signing bills of lading and was to be considered earned and not returnable, ship and/or cargo lost or not lost, the freight was due or earned on shipment of the cargo or the execution of the bills of lading, and before the dispatch of the telegraphic notice provided by the freight clause.

9. Whether Purfina, which was unable to perform its contract on October 11, 1940, because of the suspension of the vessel's sailing on October 2nd by order of the Belgian Ambassador and the withdrawal of the departure permit by the Merchant Ship Control, could impose liability for the payment of freight on Mitsubishi by telegraphing Mitsubishi on that date that bills of lading had been signed.

10. Whether the frustration of the voyage occurred on November 5, 1940, when the voyage was cancelled by the Belgian Government, or on November 16th, when the trading permits were revoked, or whether the frustration was composed of a series of acts on the part of the United States and Belgian Governments, commencing with the October 2nd suspension order and ending on November 16th.

11. Whether the series of Governmental orders, prohibitions and restrictions, commencing with the suspension order on October 2nd and culminating in the cancellation of the voyage on November 5th, should not be considered as a whole in determining the scope of the frustration and whether, in such view, the frustration did not really commence on October 2, 1940.

12. Whether Purfina was excused from performing the charter by the "Restraints of Princes" clause and the Chamber of Shipping 1937 War Risk Clauses therein.

13. Whether the case at bar is governed by the decisions in *The Allanwilde*, *The Gracie D. Chambers*, *The Bris*, and *The Malcolm Baxter, Jr.*, *supra*.

14. Whether there is a conflict between the foregoing decisions, particularly the first three, and the decisions in *Texas Co. v. Hogarth Shipping Co.* and *The Tornado*, *supra*.

15. Whether the doctrine exemplified by *The Gracie D. Chambers*, *supra*, that freight, in the case of a prepaid freight clause, can be kept, if paid, where the voyage, without the fault of either party, is broken up before the vessel breaks ground at the port of shipment, is a sound one, and whether that case should be reconsidered and overruled.

16. Whether the doctrine as to freight laid down in *The Allanwilde*, *The Gracie D. Chambers*, *The Bris* and *The Malcolm Baxter, Jr.* is reconcilable with the general rule that a frustration of a contract dissolves it, and, if not, whether those cases should be reconsidered and overruled.

17. Whether Purfina, by failing to sail the *Laurent Meeus* on October 2, 1940, as soon as the cargo was loaded and the bills of lading signed, and before receipt of the order suspending the sailing, breached the charter.

18. Whether, in any event, the freight clause was properly worded to justify a recovery of freight under the circumstances here involved.

19. Whether the Belgian Government's taking over of the vessel's freights for her July voyage to Japan and its demand that the present freight be paid over to it to hold for Purfina made the Government the real party in interest so that the Court should have refused Purfina a decree under any circumstances, on the ground that the money might inure to the benefit of the Government which broke up the voyage.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the requisition of the *Laurent Meeus* on June 6, 1940, "was for no more than the Belgian Government's direction of the use of the vessel for Purfina's account."
2. In failing to hold that the requisition was complete on June 6th, and was not rescinded or modified during the period involved herein.
3. In holding that the said requisition did not affect Mitsubishi's liability for freight.
4. In failing to hold that Purfina was the licensee of its Government, trading under temporary permits, and that therefore it was estopped from relying on the Government's acts of interference as an excuse for non-performance of the charter.
5. In failing to hold that the requirement as to the Belgian Government's approval of the venture made the Government, as the requisitioner of the vessel, a party to the contract in effect, so that its withdrawal of its approval brought about a cancellation and rescission of the charter.

6. In failing to hold that it was the proposed voyage, and not merely the charter, which was subject to the approval of the Belgian Government, and that such approval of necessity had to be a continuing one.

7. In holding that the stipulation for the Belgian Government's approval was not an agreement that that Government would not subsequently exercise powers which might cause the frustration of the charter, or, if it did so act, that the charter would be avoided.

8. In failing to hold that the Belgian Government's withdrawal of its approval of the voyage and its cancellation thereof constituted a failure of the condition precedent on which the venture was based, and thus effected a dissolution of the charter *ab initio*.

9. In failing to hold that the non-availability of the *Laurent Meeus* for the performance of the voyage, due to the acts of the Belgian Government, and partly to the acts of the United States Government, dissolved the charter under an implied condition therein, within the rule stated by this Court in *Texas Co. v. Hogarth Shipping Co.* and *The Tornado*, *supra*.

10. In holding that the freight, under the freight clause, was deemed earned and due on the loading of the cargo.

11. In holding that the freight was payable by Mitsubishi on or about October 11, 1940, when it received Purfina's telegram that the bills of lading had been signed.

12. In holding that the case at bar is governed by the cases of *The Allanwilde*, *The Gracie D. Chambers*, *The Bris*, and *The Malcolm Baxter, Jr.*, *supra*.

13. In failing to hold that the series of acts of the Belgian Government commencing on October 2nd and ending on November 16, 1940, taken together, constituted a frustration and that therefore the frustration commenced on October 2nd.

14. In holding that the venture was not frustrated until November 16, 1940.

15. In failing to hold that since the voyage was broken up at the port of shipment, before the vessel broke ground, no freight was payable by Mitsubishi because of a complete failure of consideration.

16. In holding that Purfina brought itself within the "Restraints of Princes" clause of the charter by showing that the vessel's voyage was delayed by continued temporary restraints culminating in the frustrating act of the Belgian Government in taking the vessel over on November 16, 1940.

17. In failing to hold that the prior requisition of the vessel nullified the "Restraints of Princes" clause in the charter.

18. In holding that even if Purfina had failed in its duty to make the vessel seaworthy, the burden fell on Mitsubishi to show that Purfina had caused the loss of the voyage and that Mitsubishi had failed to make such proof.

19. In holding that Purfina established affirmatively that it did not cause or contribute to the failure of the vessel to leave San Pedro.

20. In holding that the custom of tankers to leave San Pedro directly after the loading of their cargoes and the

execution of the bills of lading did not apply to a single Asiatic voyage as was here chartered.

21. In holding that Purfina did not breach the charter in failing to sail the vessel promptly on loading the cargo because of the clause in the charter giving Mitsubishi the option of cancelling the charter if the vessel was not ready to load by October 15th.

22. In failing to hold that the freight clause was inadequately worded in any case to warrant a recovery of the freight under the circumstances presented.

23. In failing to refuse Purfina a decree on the ground that the real party in interest herein is the Belgian Government because of its taking over the vessel's freight on her prior voyage to Japan and its requirement that the freight in dispute, if collected, be paid over to it to hold as an alleged trustee for Purfina.

Reasons for Granting the Writ.

1. The Court below, in holding that the Belgian Government's requisition of the *Laurent Meeus* in June, 1940, was one of limited scope and did not affect Mitsubishi's liability to pay freight, has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Court below, in holding that the condition precedent as to the Belgian Government's approval of the venture did not mean that the contract should fall in the event of a subsequent withdrawal of the approval, has again de-

cided an important question of federal law, which has not been, but should be, settled by this Court.

3. The Court below, in holding that the charter, and with it the freight clause, was not dissolved under an implied condition therein, when the vessel ceased to be available for the performance of the contract because of the action of the Belgian Government, has decided a federal question probably in conflict with the decisions of this Court in *Texas Co. v. Hogarth Shipping Co.* and *The Tornado, supra*.

4. The Court below, in holding that the present case is not distinguishable from *The Allanwilde*, *The Gracie D. Chambers*, *The Bris* and *The Malcolm Baxter, Jr., supra*, has decided an important question of law which should be settled by this Court.

5. It is desirable, it is believed, that the doctrine as to prepaid freight stated in the four cases last mentioned should be re-examined and a determination made as to whether it is reconcilable with the rule as to dissolution of a contract by frustration stated in *Texas Co. v. Hogarth Shipping Co.* and *The Tornado, supra*, and, if not, whether these four cases should not be overruled.

6. The Court below, in holding that freight became due and earned before the date fixed for its payment when there was no provision in the freight clause fixing any specific time when freight was deemed due or earned, has decided a question of extreme importance to ship-owners and marine underwriters, which should be settled finally by this Court.

7. The Court below, in holding that Purfina, while disabled from performing its contract, could, by its affirmative act, still impose liability on Mitsubishi for the payment of freight, has decided an important federal question which has not been, but should be, settled by this Court.

8. The Court below, in holding, in spite of the fact that the vessel could not sail from San Pedro at any time after October 2nd because of the acts of the Belgian Government, that the voyage was not frustrated until it was formally cancelled and physical possession of the ship taken in November, has decided an important question as to frustration which should be finally settled by this Court.

9. The Court below, in holding that the charter was not breached by Purfina in the vessel's failure to sail on October 2nd, has decided a question of importance to ship-owners and underwriters and one which should be settled by this Court, particularly in view of the lower Court's reliance on *Malcolm Baxter, Jr., supra*, in support of its holding.

10. The lower Court, in failing to refuse Purfina a decree, in view of Purfina's agreement to turn over the freights in question to the Belgian Government to hold as an alleged trustee, but with the acknowledged power of expropriation, has rendered a decision which calls for final review by this Court.

WHEREFORE, your petitioners, referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Ninth Circuit, to certify and send to this

Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, March 1, 1943.

MITSUBISHI SHOJI KAISHA, LTD.,
GENERAL PETROLEUM CORPORATION OF CALIFORNIA,
ROYAL INDEMNITY COMPANY,
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioners.

By—JOHN W. CRANDALL,
GEO. WHITEFIELD BETTS, JR.,
ARCH E. EKDALE,
MARTIN J. WEIL,
Counsel for Petitioners.

